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82-287

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-____

STATE OF ARIZONA, et al.,

Petitioners,

vs.

ASH GROVE CEMENT COMPANY, et al.,

Respondents.

MOTION FOR RELIEF FROM COMPLIANCE WITH CERTAIN PROVISIONS OF SUPREME COURT RULES 19.3, 21.1(b), 28.1 and 28.3

JOSEF D. COOPER
Counsel of Record
TRACY R. KIRKHAM
KIRK A. McKINNEY
ELIZABETH A. SPURLOCK
COOPER, KIRKHAM, HAINLINE & McKINNEY, P.C.
300 Montgomery Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 788-3030

KENNETH R. REED
MARK D. FREITAG
Special Assistant Attorneys General for the State of Arizona
REED, GOLDSTEIN & JENKINS-REED, P.C.
114 West Adams, Suite 760
Phoenix, AZ 85003
Telephone: (602) 254-1973

Counsel for Petitioners

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MOTION FOR RELIEF FROM COMPLIANCE WITH CERTAIN PROVISIONS OF SUPREME COURT RULES 19.3, 21.1(b), 28.1 and 28.3

Petitioners respectfully move this Court for relief from certain provisions of Supreme Court Rules 19.3, 21.1(b), 28.1, and 28.3, or if the motion is to be denied, that it be on the basis that absent class members are not "parties" for purposes of 28 U.S.C. § 455 and Supreme Court Rule 21.1(b). In support of their motion, Petitioners state:

1. Pursuant to 28 U.S.C. § 1254(1), petitioners[1] are filing simultaneously herewith a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition") from an Opinion of the United States Court of Appeals for the Ninth Circuit dismissing an appeal taken pursuant to 28 U.S.C. § 1291 and denying permission to appeal under 28 U.S.C. § 1292(b). The subject of those appeals is an Opinion and Order of Chief Judge C. A. Muecke, United States District Court for the District of Arizona, filed May 26, 1981. In his Opinion and Order, Chief Judge Muecke found that all members of three classes of pur-

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[1] Petitioners and the plaintiffs below are: the States of Alabama, Arizona, California, Colorado, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas and Utah; Rubenstein Development Company and Harry Rubenstein; Bill Carson d/b/a Bill Carson Construction and Bill Carson Construction Co., Inc.; Leavell Company; James I. Barnes Construction Co. and James I. Barnes Construction Co., Inc.; William P. Jungelhaus; Buck Brown Contracting Company, Inc.; Hechinger Company; Katterjohn Concrete Products of Owensboro, Kentucky, Inc.; The Sta-Dri Company; York Concrete Co. and York Concrete, Inc.; Sea Foamed of San Diego and Sea Foamed of Arizona; Vincent S. Perry and Ellis F. Hendricks, individually and d/b/a Perry and Hendricks; Estes Homes; Blankenship Builders, Inc. and Blankenship Construction Co.; Wooldridge Construction Co.; John Talley and John Talley Construction, Inc.; Picou's Builders Supply, Inc.; City of Austin, Texas; Northern Materials, Inc.; Smith & Green Corp., Allen R. Smith and Raymond Green; Colorado Concrete Mfg. Co.; Walter K. Laursen d/b/a Thriftway Lumber and Thriftway Lumber Company; and Edward W. Bergquist, as Trustee in Bankruptcy for Western Concrete Products Corp.

chasers of cement and cement-containing products certified in In re Cement and Concrete Antitrust Litigation, MDL Docket No. 296, are "parties" to that litigation for purposes of evaluating disqualification under 28 U.S.C. § 455(b)(4).[2]

2. Along with the Petition and this motion, petitioners are filing with the Clerk of this Court as Exhibit A hereto one copy of a five volume list of the 210,235 class members in MDL 296, and now move for relief from certain filing and service obligations under Supreme Court Rules 19.3 and 28.3, as well as the requirement of Rules 21.1(b) and 28.1 that the list of all parties, and their corporate parents, subsidiaries and affiliates, appear in the text of the Petition or as a footnote.

3. Under Judge Muecke's ruling, the Rule 21.1(b) list "of all parties to the proceeding" would include the names of all 210,235 class members appearing on the Master Class List. This computerized list of class members stands four feet high in standard, computer print-out form. For the copy provided to this Court, petitioners reduced the type face and thereby condensed the list to five volumes. Nevertheless, it was impossible to include the list within the body of the printed Petition or as an Appendix thereto without rendering it too physically cumbersome to be used by this Court. Accordingly, petitioners request that the filing of one copy of the five volume list with the Clerk of the Court

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[2] Applying Judge Muecke's ruling to this Court would result in recusal of five Justices, thereby defeating the quorum and preventing consideration of this motion. The 1982 financial disclosure statements of Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist and O'Connor include stock holdings in corporations which appear on the Master Class List. Justice O'Connor also appears to be disqualified under 28 U.S.C. § 455(b)(5)(ii) because of her spouse's former membership in a law firm representing a number of the respondents and defendants in the district court.

be deemed full compliance with Supreme Court Rule 21.1(b) and the printing requirement of Rule 33, and that they not be required to file additional copies of this list with the forty (40) additional copies of the Petition required by Supreme Court Rule 19.3.

4. Additionally, under Judge Muecke's ruling, compliance with Supreme Court Rule 28.1 would require the listing of all parents, subsidiaries and affiliates of each of the thousands of class members. Petitioners have no practicable way to compile this information. Petitioners accordingly request relief from further compliance with this Rule, such that filing of one copy of the Master Class List (as Exhibit A to this motion) constitutes compliance with Supreme Court Rule 28.1.

5. It would also entail an immense expenditure of manpower, copying costs and postage for petitioners to serve a copy of the list of all absent class members on each of the counsel for named parties to this proceeding as required by Supreme Court Rule 28.3. A microfiche copy of this list was previously provided to all defendants requesting a copy, and a hard copy of such list was also served on William J. Maledon, Esq., one of defendants' liaison counsel, in conjunction with the proceedings in the court of appeals. Petitioners are serving a copy of this Exhibit A on David Bonderman, Esq. who previously entered an appearance as counsel of record for respondents in conjunction with prior applications to Justice Rehnquist for an extension of time for filing the Petition. Accordingly, petitioners request that such service, coupled with the service of the Master Class List previously completed in the proceedings before the district court and court of appeals, be deemed sufficient to complete service on respondents to the Petition, and that

petitioners are excused from further compliance with Supreme Court Rule 28.3.

6. In the alternative to granting relief from the foregoing rules, petitioners request that this Court hold that absent class members are not "parties" for the purpose of 28 U.S.C. § 455 or the Rules of the Supreme Court, and that the printed Petition fully complies with the Supreme Court Rules in its listing of all named parties to the action below. Such a holding would also permit this Court to consider this motion and all other petitions before it arising from this litigation without the loss of the quorum required under 28 U.S.C. § 1. See, fn.2, supra.

CONCLUSION

WHEREFORE, petitioners pray this Court for an Order:

(1) That petitioners have fully satisfied Supreme Court Rules 21.1(b) and 28.1 by filing with the Clerk of this Court, as Exhibit A to this motion, one copy of the Master Class List of absent class members;

(2) That petitioners have satisfied the filing requirement of Supreme Court Rule 19.3 by filing 40 copies of the Petition and one copy of the Master Class List of absent class members with the Clerk of the Court; and

(3) That petitioners have satisified the service requirement of Supreme Court Rule 28.3 by serving copies of only their Petition on the respondents, the other named parties and class members who have entered an appearance in the proceedings in the district court, and by serving one copy of Exhibit A hereto on respondents' counsel of record in the Supreme Court; and that petitioners are relieved of any obligation which might otherwise exist to serve the Petition

and/or Exhibit A hereto on all members of the classes, or to serve Exhibit A on any other of respondents' counsel.

Alternatively, petitioners pray that this Court order that absent class members are not "parties" for purposes of 28 U.S.C. § 455 or the Supreme Court Rules, and that the Petition as filed is in full compliance with these Rules.

DATED: August 16, 1982

Respectfully submitted,

JOSEF D. COOPER
TRACY R. KIRKHAM
KIRK A. McKINNEY
ELIZABETH A. SPURLOCK
COOPER, KIRKHAM, HAINLINE
& McKINNEY, P.C.

KENNETH R. REED
MARK D. FREITAG
REED, GOLDSTEIN &
JENKINS-REED, P.C.

By Josef D. Cooper
Josef D. Cooper
On Behalf of Petitioners

PROOF OF MAILING - AFFIDAVIT

I, Josef D. Cooper, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th of August, 1982, I deposited in a United States Postal Service mailbox, located at the Rincon Annex Post Office, Spear and Mission Streets, San Francisco, California, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, 40 copies of the foregoing "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" and one copy of Exhibit A thereto.

Josef D. Cooper

Josef D. Cooper

Subscribed and sworn to before me, at San Francisco, California this 16th day of August, 1982.

OFFICIAL SEAL
DOUGLAS A. MARSHALL
NOTARY PUBLIC CALIFORNIA
CITY AND COUNTY OF
SAN FRANCISCO
My Commission Expires Oct. 9, 1984

Douglas A. Marshall

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Proof of Service - Certificate by Bar Member

JOSEF D. COOPER
Counsel of Record
TRACY R. KIRKHAM
KIRK A. McKINNEY
ELIZABETH A. SPURLOCK
COOPER, KIRKHAM, HAINLINE
& McKINNEY, P.C.
300 Montgomery Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 788-3030

KENNETH R. REED
MARK D. FREITAG
Special Assistant
Attorneys General
of the State of Arizona
REED, GOLDSTEIN &
JENKINS-REED, P.C.
114 West Adams, Suite 760
Phoenix, Arizona 85003
Telephone: (602) 254-1973

Counsel for Petitioners

I, Josef D. Cooper, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of August, 1982, one copy of the enclosed "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" was served on the persons identified on the attached list, and one copy of Exhibit A thereto (five volume "Master Class List") was served on David Bonderman, Arnold & Porter, 1200 New Hampshire Avenue, N.W., Washington, D.C. 20036, by First Class United States Mail.

Josef D. Cooper

DEFENDANTS' COUNSEL

Robert E.B. Allen, Esq.
Louis A. Stahl, Esq.
Deana S. Peck, Esq.
Streich, Lang, Weeks & Cardon, P.A.
100 West Washington, Suite 2100
Phoenix, AZ 85003

Harvey M. Applebaum, Esq.
Lyn M. Schlitt, Esq.
Gregg H. Levy, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044

Richard A. Black, Esq.
Steven D. Copple, Esq.
Black, Robertshaw, Frederick,
Copple & Wright, P.C.
3003 N. Central Ave., Suite 2305
Phoenix, AZ 85012

Ray S. Bolze, Esq.
William J. Hunter, Jr., Esq.
Howrey & Simon
Suite 900
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

David Bonderman, Esq.
Linda C. Moore, Att'y at Law
Arnold & Porter
1200 New Hampshire, Ave., N.W.
Washington, D.C. 20036

John J. Bouma, Esq.
Daniel J. McAuliffe, Esq.
Robert B. Hoffman, Esq.
Snell & Wilmer
3100 Valley Center Building
Phoenix, AZ 85073

Ralph W. Brenner, Esq.
Francis P. Newell, Esq.
David N. Hofstein, Esq.
Montgomery, McCracken, Walker
& Rhoads
Three Parkway, 20th Floor
Philadelphia, PA 19102

Lawrence R. Brown, Esq.
Michael W. Lerner, Esq.
Stinson, Mag & Fizzell
P.O. Box 19251
2100 Tenmain Center
Kansas City, MO 64141

William H. Buchanan, Esq.
600 Grant Street, Rm 6082
Pittsburgh, PA 15230

George H. Cain, Esq.
Day, Berry & Howard
Three Landmark Square
Stamford, CT 06901

Thomas F. Call, Esq.
Charles Griffin Cale, Esq.
Margaret Levy, Att'y at Law
Adams, Duque & Hazeltine
523 West Sixth Street, 10th Floor
Los Angeles, CA 90014

George Read Carlock, Esq.
Raymond N. Hunter, Esq.
Ryley, Carlock & Ralston
Arizona Bank Bldg., 26th Floor
101 North First Avenue
Phoenix, AZ 85003

C. A. Carson, Esq.
Harry M. Beggs, Esq.
Carson, Messinger, Elliott,
Laughlin & Ragan
3300 N. Central Ave., Suite 19
Phoenix, AZ 85012

Stephen W. Connors, Esq.
1309 W. McDowell
Phoenix, AZ 85007

Donald F. Daughton, Esq.
James P. Walsh, Esq.
Daughton, Feinstein & Wilson
100 W. Washington, Suite 1840
Phoenix, AZ 85003

Vardaman Dunn, Esq.
Cox & Dunn, Ltd.
P.O. Box 1046
Jackson, MS 39205

J. Randolph Elliott, Esq.
Vice President & General Counsel
John L. Progge, Jr., Esq.
Assitant Secretary
Assitant General Counsel
California Portland Cement Co.
800 Wilshire Boulevard
Los Angeles, CA 90017

John R. Elliott, Esq.
3225 No. Central Ave.,
Suite 1414
Phoenix, AZ 85012

Terry E. Fenzl, Esq.
Brown & Bain, P.A.
222 No. Central Ave., 9th Floor
Phoenix, AZ 85004

Donald H. Ford, Esq.
Carl J. Schuck, Esq.
Frederick A. Clark, Esq.
Overton, Lyman & Prince
P.O. Box 54299 T.A.
Los Angeles, CA 90054

Victor S. Friedman, Esq.
Alexander R. Sussman, Esq.
Ilene P. Karpf, Esq.
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, NY 10004

Glen E. Fuller, Esq.
Portland Cement Co. of Utah
P.O. Box 1469
Salt Lake City, UT 84110

Burnham H. Greeley, Esq.
Gerald A. Sumida, Esq.
Carlsmith, Carlsmith, Wichman
& Case
2200 Pacific Trade Center
Honolulu, HI 96813
Robert H. Green, Esq.
Robbins, Green, P.A.
1800 United Bank Building
3300 North Central Avenue
Phoenix, AZ 85012

Laurence Greenwald, Esq.
Bruce Schneider, Esq.
Strook & Strook & Lavan
61 Broadway
New York, NY 10006

J. Clifford Gunter, III, Esq.
William Ikard, Esq.
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, TX 77002

Robert C. Hackett, Esq.
Shimmel, Hill, Bishop
& Gruender, P.C.
111 West Monroe, 10th Floor
Phoenix, AZ 85003

John J. Hanson, Esq.
Don Howarth, Esq.
Steven C. McCracken, Esq.
Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, CA 90071

Mark I. Harrison, Esq.
Harrison, Singer & Lerch, P.C.
650 North Second Street
Phoenix, AZ 85003

Bud George Holman, Esq.
Kelley, Drye & Warren
350 Park Avenue
New York, NY 10022

Kenneth H. Holmes, Esq.
Thomas D. Halket, Esq.
Dewey, Ballantine, Bushby,
Palmer & Wood
140 Broadway
New York, NY 10005

Edward W. Hyland, Esq.
Secretary and General Counsel
Lehigh Portland Cement Co.
718 Hamilton Street
Allentown, PA 18105

Manuel S. Klausner, Esq.
Kindel & Anderson
555 South Flower Street
Los Angeles, CA 90071

Michael J. LaVelle, Esq.
Henry, Kimerer, LaVelle & Erlichman
2715 North Third Street
Phoenix, AZ 85004

Fred G. Lemberg, Esq.
Maillin, Lemberg, Brody & Brown
3507 North Central Avenue, Suite 502
Phoenix, AZ 85012

Richard C. Lowery, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006

John Lundin, Esq.
Wentworth & Lundin, P.A.
3400 Valley Center Building
Phoenix, AZ 85073

William J. Maledon, Esq.
Martori, Meyer, Hendricks & Victor
2700 North Third Street, Suite 4000
Phoenix, AZ 85004

Daniel W. McAllen, III, Esq.
P.O. Box 31707
Dallas, TX 75231

Kent E. Mast, Esq.
L. Trammel Newton, Esq.
Hansell, Post, Brandon & Dorsey
3300 First National Bank Tower
Atlanta, GA 30303

David R. McAtee, Esq.
Gregory S. C. Huffman, Esq.
Thompson & Knight
2300 Republic National Bank Bldg.
Dallas, TX 75201

William C. McClearn, Esq.
Gordon G. Greiner, Esq.
James E. Hartley, Esq.
Holland & Hart
555 17th Street, Suite 2900
Denver, CO 80202

John J. McHugh, Esq.
Peter R. Sonderby, Esq.
Chadwell, Kayser, Ruggles,
McGee & Hastings
8500 Sears Tower
233 South Wacker Drive
Chicago, IL 60606

Donald C. McKinlay Esq.
John M. Kobayashi, Esq.
Holme, Roberts & Owen
1700 Broadway
Denver, CO 80202

John J. McLoone, Jr., Esq.
McLoone, Theobald & Galbut, P.C.
2525 East Arizona Biltmore Circle
Suite 140
Phoenix, AZ 85016

Charles G. Middleton, Jr., Esq.
Middleton & Reutlinger
501 South Second Street
Louisville, KY 40202

William C. Miller, Esq.
Brian D. Ballardo
Terry D. Carlone
Pillsbury, Madison & Sutro
P.O. Box 7880
San Francisco, CA 94120

Frank E. Nash, Esq.
R. Alan Wight, Esq.
Thomas C. Sand, Esq.
Miller, Anderson, Nash, Yerke
& Weiner
900 S.W. Fifth Avenue
Portland, OR 97204

A. Jackson Noble, Jr., Esq.
J. Patrick Logan, Esq.
Thomas, Taliaferro, Forman,
Burr & Murray
Bank for Savings Bldg., 16th Floor
Birmingham, AL 34203

Carl Pagter, Esq.
Kaiser Cement & Gypsum Corp.
300 Lakeside Drive
Oakland, CA 94606

M.D. Sampels, Esq.
Robert A. Wooldridge, Esq.
Richard L. Adams, Esq.
Worsham, Forsythe & Sampels
2001 Bryan Tower, Suite 2500
Dallas, TX 75201

Richard G. Schneider, Esq.
Jean Wegman Burns, Esq.
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Paul W. Schroeder, Esq.
John W. Treece, Esq.
Isham, Lincoln & Beale
One First National Plaza, Suite 4200
Chicago, IL 60603

Richard A. Segal, Esq.
Gust, Rosenfeld, Divelbiss
& Henderson
3300 Valley Center Building
Phoenix, AZ 85073

Robert H. Shepard, Esq.
James J. Locher, Esq.
Shepard & Locher
721 Brick and Tile Building
Mason City, IA 50401

Wildman, Harrold, Allen,
Dixon & McDonnell
Union Planters Bank Building, 12th Fl.
67 Madison Avenue
Memphis, TN 38103

Carl L. Steinhouse, Esq.
Stephen Squeri
Jones, Day, Reavis & Pogue
1700 Union Commerce Building
Cleveland, OH 44115

William T. Plesec, Esq.
Jones, Day, Reavis & Pogue
1735 Eye Street, N.W.
Washington, D.C. 20006

Paul R. Haerle, Esq.
Max Thelen, Jr., Esq.
Robert B. Pringle, Esq.
Thelen, Marrin, Johnson & Bridges
Two Embarcadero Center
San Francisco, CA 94111

Philip C. von Ammon, Esq.
Timothy J. Burke, Esq.
William L. Thorpe, Esq.
Fennemore, Craig, von Ammon & Udall
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, AZ 85003

Robert W. Wachsmuth, Esq.
Kelfer, Coatney, Wachsmuth
& Saunders
2020 National Bank of Commerce Bldg.
San Antonio, TX 78205

Seagal V. Wheatley, Esq.
Reese L. Harrison, Jr., Esq.
Oppenheimer, Rosenberg, Kelleher
& Wheatley
711 Navarro, Suite 620
San Antonio, TX 78205

H. Blair White, Esq.
Nathan P. Eimer, Esq.
William H. Baumgartner
Sidley & Austin
One First National Plaza, Suite 4700
Chicago, IL 60603

Robert J. Vizas
Heller, Ehrman, White & McAuliffe
Thirty-First Floor
Wells Fargo Building
44 Montgomery Street
San Francisco, CA 94104
James Ebright
Margaret Ugarte
Filtrol Corporation
Suite 900
6033 West Century Blvd.
Los Angeles, CA 90045

PLAINTIFFS' COUNSEL

William C. Barnard, Esq.
James E. Hughes, Esq.
Paula M Frost
Sommer & Barnard
1100 Merchants Bank Building
Indianapolis, IN 46204

Donald D. Barry, Esq.
Barry & Jarboe
Post Office Box 4816
5020 West 28th
Topeka, KS 66604

Dale A. Comer, Esq.
Assistant Attorney General
Antitrust Division
State of Nebraska
2115 State Capitol
Lincoln, NE 68501

John C. Blazier, Esq.
John Blazier & Associates
1600 American Bank Tower
Austin, TX 78701

Robert L. Bluemle, Esq.
Furth, Fahrner, Bluemle & Mason
Financial Center, Suite 400
3443 North Central Avenue
Phoenix, AZ 85012

Jerome I. Braun, Esq.
John L. Cooper, Esq.
Neil A. Goteiner, Esq.
Farella, Braun & Martel
235 Montgomery Street, Suite 3100
San Francisco, CA 94104

James M. Brown
Attorney General
Richard L. Caswell
Chief Counsel
Antitrust Division
Department of Justice
235 Union Street, N.E.
Salem, OR 97310

Bill L. Bryant, Jr., Esq.
Chief, Antitrust Section
Department of Legal Affairs
The Capitol
Tallahassee, FL 32301

Jerome J. Cate, Esq.
Chief, Antitrust Enforcement
Bureau
Charles E. Erdmann
Staff Attorney, Antitrust
Enforcement Bureau
State Capitol
Helena, MT 59601

Jack Chestnut, Esq.
Joseph T. Burkard, Esq.
Chestnut & Brooks, P.A.
900 Midland Bank Building
Minneapolis, MN 55401

John A. Cochrane, Esq.
James Bresnahan, Esq.
Cochrane & Bresnahan
360 Wabash Street, Suite 500
St. Paul, MN 55102

Robert S. Atkins, Esq.
Robert F. Coleman, Esq.
Freeman, Atkins & Coleman, Ltd.
Three First National Plaza
Suite 2300
Chicago, IL 60602

Arthur J. Davich, Esq.
Davich & Pollock
2214 North Central Ave., Suite 108
Phoenix, AZ 85004

Jeffrey Oritt, Esq.
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Carl W. Divelbiss, Esq.
1950 Arizona Bank Building
101 North First Avenue
Phoenix, AZ 85003

Stephen L. Dunne, Esq.
Law Offices of Stephen L. Dunne
1139 Camino del Mar
Del Mar, CA 92014

Susan Beth Farmer, Att'y at Law
James Drury Flowers
Assistant Attorneys General
250 Administrative Building
64 North Union Street
Montgomery, AL 36130

John R. Flowers, Jr., Esq.
Assistant Attorney General
Chief, Antitrust Section
Vivienne Monachino
Robert J. Caluda, Esq.
Staff Attorneys
2-3-4 Loyola Building, Suite 717
New Orleans, LA 70112

Frederick P. Furth, Esq.
Daniel S. Mason, Esq.
Matthew Joseph, Esq.
Furth, Fahrner, Bluemle & Mason
Furth Building, Suite 1000
201 Sansome Street
San Francisco, CA 94104

Herbert A. Garon, Esq.
Jacques F. Bezou, Esq.
Garon, Brener & McNeely
1304 First National Bank of
Commerce Building
New Orleans, LA 70112

Kenton C. Granger, Esq.
Thomas H. Brill, Esq.
Anderson, Granger, Nagels
and Lastelic, Chartered
306 Capitol Federal Building
95th and Nall Avenue
Overland Park, KS 66207

Richard H. Greener, Esq.
Clemons, Cosho, Humphrey
& Samuelson
1110 Bank of Idaho Building
Boise, ID 83702

Jerry L. Harris, Esq.
City Attorney
City of Austin
Municipal Building
P.O. Box 1088
Austin, TX 78767

Robert F. Hill, Esq.
Special Assistant Attorney General
Friedman, Hill & Robbins
220 Equitable Building
730 Seventeenth Street
Denver, CO 80202

Gerald B. Hirsh, Esq.
1005 Home Federal Savings Tower
Tucson, AZ 85701

David G. Burney, Esq.
Ronald R. House
Bryans & House
Wells Fargo Bldg, Suite 1100
1007 Fifth Avenue
San Diego, CA 92101

Wayne E. Hundley, Esq.
Deputy Attorney General
Chief, Antitrust Division
Carl M. Anderson, Esq.
Terri G. Zimmerman
Assistant Attorneys General
2nd Floor, Kansas Judicial Center
Topeka, KS 66612

William H. Ferguson, Esq.
Thomas J. Greenan, Esq.
Christopher Kane, Esq.
Ferguson & Burdell
29th Floor, One Union Square
Seattle, WA 98101

Kevin H. Roche'
Special Assistant Attorney General
2nd Floor, Ford Building
117 University Avenue
St. Paul, MN 55155

Mitchell A. Kramer, Esq.
Herbert W. Salus, Jr., Esq.
Steven Kapustin, Esq.
Kramer and Salus
1520 Locust Street, 7th Floor
Philadelphia, PA 19102

Michael E. Kris, Esq.
Joseph D. Tydings, Esq.
Finley, Kumble, Wagner, Heine,
Underberg & Casey
Suite 1010, Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

John S. Lancy, Esq.
Lancy, Sculz & Ryan
2601 First Federal Savings Bldg.
3003 North Central Avenue
Phoenix, AZ 85012

Gerald Maltz, Esq.
John A. Baade, Esq.
Miller, Pitt & Feldman
111 South Church Avenue
Tucson, AZ 85701

T.J. Pantaleo, Esq.
Pantaleo and Kudon, Chartered
Ahmanson Center East
3701 Wilshire Boulevard, 7th Floor
Los Angeles, CA 90010

Kenneth R. Reed, Esq.
Mark Freitag
Special Assistant Attorney General
Law Offices of Kenneth R. Reed, P.C.
114 West Adams Street, Suite 760
Phoenix, AZ 85003

Alison B. Swan, Att'y at Law
Chief Counsel
Antitrust Division
Charles Eger, Esq.
Assistant Attorney General
State Capitol Building
2nd Floor, West Wing
1700 West Washington
Phoenix, AZ 85007